In the
Supreme Court of the United States

OCTOBER TERM, 1958

No. 238

WILSON H. WALTERS, CHARLES P. CAIN and KEITH TERRY, *Petitioners,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION

Come now Wilson H. Walters, Charles P. Cain and Keith Terry, appellants in the Court of Appeals for the Ninth Circuit, through their attorneys Charles S. Burdell and John J. Keough, and respectfully petition this court for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the Court of Appeals in Wilson H. Walters, Charles P. Cain and Keith Terry v. United States of America, No. 15483 (Appendix, *infra*, p. 1A) is of the date of this petition unreported in the official reports.

JURISDICTION

Petitioners were indicted in the District Court for the Eastern District of Washington, Northern Division, under 18 U.S.C.A. Sec. 1341 (62 Stat. 763 and also

63 Stat. 94) on five counts of using the mails to defraud; under 15 U.S.C.A. Sec. 77-q (48 Stat. 84 and also 68 Stat. 686) on five counts of violation of the Securities Act and were in addition charged with one count of conspiracy to violate the above-mentioned statutes under 18 U.S.C.A. Sec. 371 (62 Stat. 701).

Jurisdiction of the trial court was based upon 18 U.S.C.A. Sec. 3231 (62 Stat. 826). Petitioners appealed to the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C.A. Sec. 1291, 1294 (62 Stat. 929, 930). The judgment of the United States Court of Appeals for the Ninth Circuit was an affirmance of conviction in the trial court (Appendix, *infra*, p. 9A).

A Petition for Rehearing was filed on May 8, 1958, and was denied on June 30, 1958 (Appendix, *infra*, p. 10A).

The jurisdiction of this court is invoked under 28 U.S.C.A. Sec. 1254 (62 Stat. 928).

QUESTIONS PRESENTED FOR REVIEW

No. 1. Was the District Court's instruction, to-wit, "A scheme to defraud may well include later efforts to avoid detection of the fraud. Avoidance of detection and prevention of recovery of property fraudulently obtained may be material part of an illegal scheme.", in conflict with this Court's holding in *Grunewald v. United States* (1957) 353 U.S. 391?

No. 2. Whether or not there was sufficient evidence to give the above instruction in view of *Grunewald v. United States*, 353 U.S. 391.

LAW INVOLVED

Certiorari is sought in this case on the theory that the aforementioned instruction of the trial court is contrary to the rule announced by this court in *Grunewald v. United States*, 353 U.S. 391, to the effect that a crime is completed upon the obtainment of its main purpose. Also relevant is the case of *Krulewitch v. United States*, 336 U.S. 440, in which this Court held that an admission by one alleged conspirator was not an admission of another conspirator after the central objective of the conspiracy had been completed.

STATEMENT OF FACTS

For the purposes of this petition, petitioners accept the findings of the Circuit Court as to the sufficiency of the evidence (with one exception which will hereafter be noted) and the Circuit Court's resume of the evidence. The entire transaction in this case is centered around the sale of certain surplus certificates of a Washington insurance corporation called Washington Insurance Company (Mutual) of which a Mr. Jensen was president (Opinion, *infra*, p. 3A). The petitioners were to sell $25,000 of the surplus certificates in the company and $30,000 of outstanding surplus certificates issued by that company to a corporate agency thereof (Opinion, *infra*, p. 3A). The purpose of the arrangement was to put the Washington Insurance Company (Mutual) "in good shape" for the purposes of financing a new agency to sell insurance to motels at a reduced rate (Opinion, *infra*, p. 3A). The petitioners oversold the amount of certificates authorized (Opinion, *infra*, p. 4A). Their chief defense was that they

acted severally and in good faith (Opinion, *infra*, p. 2A). There was sufficient evidence from which the jury could have found that they had done so (Opinion, *infra*, p. 2A).

The petitioners contended that Jensen informed them that he had received authorization to sell additional certificates (Tr. 975, 976, 1203). Eventually the Insurance Commissioner's office began an investigation. On that phase, which is the important one in this case, the Circuit Court found that there was evidence to support the following:

> "The Washington Insurance Department commenced an investigation. After that date there were no more sales of surplus certificates, but the evidence shows strenuous efforts to conceal the unauthorized sales by Terry and Jensen, and the latter also performing a bookkeeping operation to conceal the oversale from the examiners." (Opinion, *infra*, p. 4A)

The petitioners and Jensen were indicted on mail fraud, violation of the Securities Act and conspiracy to violate those acts. All pleaded not guilty, but after several witnesses had testified, Jensen entered a plea of guilty to the counts charging mail fraud and conspiracy and testified for the government (Opinion, *infra*, p. 2A). The remaining counts were dismissed against Jensen at the trial. Walters was found guilty on all counts and sentenced to one year and six months' imprisonment. Cain was convicted on mail fraud sale of securities fraudulently and conspiracy and not guilty on the others. He was given an eight months' sentence on one mail fraud count and imposition of sentence

was postponed as to the others. Terry was found guilty of all counts except one relating to mail fraud. He received three months' sentence on one count, imposition of sentence being postponed as to all other counts (Opinion, *infra*, p. 2A).

CIRCUIT COURT DECISION

The petitioners appealed to the Circuit Court of Appeals for the Ninth Circuit claiming that the government had failed to prove criminal intent, that it was error to allow consideration of certain misrepresentations alleged, that the testimony of the wife of one of the petitioners was competent and should not have been excluded, that the trial court did not give an accurate instruction relating to good faith, and that an instruction that appellants' efforts to avoid detection of a scheme to defraud might be a material part of the original scheme was erroneous (Opinion, *infra*, p. 1A).

In regard to the question now before this Court the Circuit Court found as follows:

> "It is also objected that the trial court erred in giving the following instruction:
>
> "'A scheme to defraud may well include later efforts to avoid detection of a fraud. Avoidance of detection and prevention of recovery of property fraudulently obtained may be a material part of the illegal scheme.'
>
> "But the instruction was correct as a matter of law if applicable to the facts. The record in this case clearly shows their efforts to conceal the sale of surplus certificates and there is evidence from which the jury might well conclude that each was a participant therein. Besides, there is proof of the

existence of a conspiracy, and each person shown to be a party thereto is bound by all of the subsequent acts of any co-conspirator until he has proved by affirmative action that he has severed himself therefrom." (Opinion, *infra*, pp. 6A, 7A)

The Circuit Court thus held that the instruction was a correct one if there was evidence of attempts to avoid detection, that there was evidence of efforts to conceal the sale of the surplus certificates to avoid detection, that there was evidence that all of the defendants in the lower court participated in the concealment and that in any event once a person enters a conspiracy, he is bound by all subsequent acts of any co-conspirator regardless of when the crime is completed.

Petitioners respectfully contend that there was not evidence from which the jury might have concluded that each was a participant therein. Moreover, petitioners respectfully urge that the Circuit Court's decision is in conflict with cases of this Court.

ARGUMENT

I.

The District Court's Instruction Concerning Efforts to Avoid Detection Is in Conflict with This Court's Holding in *Grunewald v. United States*

A. *Krulewitch v. United States*

Before discussing the *Grunewald* case some notice should be taken of *Krulewitch v. United States*, 336 U.S. 440, the case in which this Court drew a sharp distinction between acts and statements necessary to accomplish the main purpose of crime and acts and statements made after the crime was achieved. In that

case the defendant was charged with transporting a woman in interstate commerce for immoral purposes and with conspiring to do the same. A statement of an alleged co-conspirator was allowed in evidence to prove that the defendant performed the acts charged in the indictment. This Court held that the admission of that evidence was reversible error, pointing out that the transportation had been completed three weeks before the alleged statement was made. This Court held that since the purposes of the conspiracy had been completed and there was no definite agreement to continue the conspiracy, the statements of one alleged conspirator could not in any way bind or be an admission against another conspirator. This principle was reaffirmed in *Lutwak v. United States*, 344 U.S. 604, as well as in the *Grunewald* case.

B. *Grunewald v. United States*

In *Grunewald v. United States*, 353 U.S. 391, this Court had before it a case in which the defendants were charged and convicted of "fixing" income tax evasion cases. One of the principal questions in the case was whether or not the prosecution was barred by reason of the three-year statute of limitations. The indictment charged that the defendants illegally secured "no prosecution rulings" from the Internal Revenue Bureau in 1948 and 1949. As the indictments were not returned until October 25, 1951, the Government claimed the defendants, pursuant to a conspiracy, schemed to defraud the Government and sought to prevent the detection of their acts as late as 1952. The Government further claimed that the acts of concealment were a material

part of the crime because (1) there was an express agreement between the two alleged conspirators to avoid detection of the crime, and (2) the acts of concealment were necessary to protect the taxpayers because the statute of limitations on the taxpayers did not run until 1952.

This Court absolutely rejected the Government's first contention. The Court pointed out that in all conspiracies conspirators will seek to escape detection and held that the acts which are designed to prevent apprehension are not a part of the crime itself. At 353 U.S. 405 this Court stated:

> "The vital distinction must be made between the acts of concealment done in furtherance of the main criminal objectives and acts of concealment after the central objectives have been obtained."

This Court therefore held that if the purpose of the scheme to defraud and the conspiracy was to obtain no prosecution rulings, then there was insufficient evidence to show the acts of concealment were done pursuant to the scheme to defraud and the conspiracy and that since the crime was completed in 1949 the statute of limitations had expired.

This Court conceded that if the aim of the conspiracy was to protect the taxpayers from tax prosecution and if the overt acts were in furtherance of that purpose, then the overt acts could be a part of the crime, the rationale being that in order to protect the taxpayers it would be necessary to conceal the illegal acts until the statute of limitations had run on tax prosecutions. It was held, however, that the trial court in its charge to

the jury did not distinguish between concealment in order to achieve the central purpose of the conspiracy and concealment to cover up an already existing crime, stating at 353 U.S. 415:

> "Further, it was incumbent on a judge to charge that in order to convict the jury would have to find the central aim of the conspiracy was to immunize the taxpayers from prosecution and this objective continued in being until October 25, 1951. * * *"

C. The conflict between the instruction and *Grunewald v. United States*

Admittedly the instruction in question, standing alone, is a valid statement of fact. Schemes to defraud and conspiracies may include efforts to avoid detection of the crime. The principal issue here, however, is not whether the trial judge made a correct statement of fact, but whether or not he correctly apprised the jury of the correct law so as to enable them to determine the guilt or innocence of the petitioners. In order to have correctly instructed the jury as to the law, the trial court should have informed the jury that in order for the efforts to avoid the detection of the fraud to be a part of the fraudulent scheme, those efforts must have been performed to obtain the central objective of the fraudulent acts. In other words, this instruction standing alone allows the jury, in its unguided discretion, to determine whether or not acts of concealment are a part of the crime.

It must be conceded that the trial court did not stop at the end of the instruction in question, but went on to explain the instruction. His explanaton was as follows:

> "Thus, if you find that the defendants, or any

of them, while acting in furtherance of the scheme or conspiracy charged in the indictment, made statements to investors or did acts which you find were for the purpose of lulling these investors into a false sense of security, or *to prevent the discovery of the illegal acts previously done by the defendants in furtherance of the scheme and conspiracy charged*, you may properly consider this as a part of the fraudulent scheme and device charged in the indictment." (Emphasis supplied) (Tr. 1347)

The above instruction is not as explanatory as the one given in the *Grunewald* case (see 353 U.S. 411-413) and fails for the same reason. It does not point out that acts performed to prevent the discovery of alleged illegal acts can only be considered as part of the scheme and conspiracy if they are performed in furtherance of the main objective of the scheme and conspiracy. The jury was not informed that acts performed to escape punishment are not a part of the crime. The jury may well have reason that all conspirators will seek to avoid detection of the crime and therefore believe that all acts performed to accomplish that purpose are in furtherance of the crime. An instruction which allows the jury to base their findings on the above rationale is, of course, inadequate under the *Grunewald* case.

In fraud cases, in particular, a distinction must be made between acts of avoidance performed to accomplish the crime and acts which are performed solely for the purpose of avoiding detection. As has been previously conceded, a scheme to defraud may include later efforts to avoid detection of the crime and to prevent the recovery of the money. In other words, the schemers

may not only seek to obtain a person's money, but also to convince him that the loss of his money was due to circumstances not created by any fraudulent intent on their part. On the other hand, the conspirators, or one of them, may perform acts to avoid detection in order to pacify the disgruntled victim long after the scheme has been accomplished. The attempts to pacify may not only be for the purposes of retaining the funds, but also to prevent the victim from seeking the assistance of the prosecuting attorney or other public agencies. If the Circuit Court's theory is adopted, one alleged co-conspirator would be bound by the acts of another alleged co-conspirator almost indefinitely. Thus in a fraud case, which involved the statute of limitations, and directly contrary to the *Grunewald* case, each attempt to pacify the victim would revive the statute of limitations. Undoubtedly the argument would be made that in fraud cases the criminal statute of limitations would not begin to run until after the civil statute of limitations had expired, on the theory that the alleged conspirators would have to conceal their fraudulent acts during the civil limitational periods in order to retain the fruits of their scheme. All schemes to defraud will, of course, have as one of their objectives the retention of the funds obtained through the scheme. Thus all criminal actions based upon fraud could be prosecuted long after the normal limitational period, and all alleged conspirators could be bound by the acts of the other alleged co-conspirators for an indefinite period after the main objective of the crime had been obtained.

The trial Court's instruction, principally its failure

to draw the jury's attention to the distinction between acts of concealment for the purposes of furthering the main objective of the crime and acts performed solely for the purpose of escaping detection, was in conflict with the reasoning of *Grunewald v. United States*, 353 U.S. 391, and therefore constituted error.

D. Reversible error

Admittedly counsel in the lower court did not except to the objectionable instruction on the grounds there was an erroneous statement of the law. This case, however, was tried approximately seven months before the decision in the *Grunewald* case and counsel, realizing that the instruction was objectionable, did raise objection to it on the grounds of insufficient evidence (Tr. 1363, 1364). The court may consider errors in instructions resulting in a miscarriage of justice. *Bryson v. United States* (9 Cir. 1956) 238 F.(2d) 657. Also as stated in the *Grunewald* case it was incumbent upon the trial judge to point out the distinction between acts of concealment done to obtain the main criminal objective and acts of concealment done solely for the purpose of avoiding detection after the essential objectives have been obtained.

The distinction between acts done in order to avoid detection and acts done to obtain the central objective of the crime could have been one of the most important factors considered by the jury. As pointed out previously the petitioners' defense rested almost solely on the ground that they were acting in good faith in relying upon the representations of Jensen. The point in question concerns the evidence that was introduced to show

that there were attempts upon the part of the petitioners to conceal the oversale of the surplus certificates after the Insurance Commissioner recommended an investigation.

The evidence showed that Jensen doctored the books in order to conceal the oversale from the examiners (Opinion *infra* p. 4A, Tr. 480). There was also evidence that the defendants Walters and Terry performed acts to pacify the purchasers of the surplus certificates (Opinion *infra* 4A, Tr. 478-482). These acts were all performed after the Insurance Commissioner had initiated his investigation (Opinion *infra* 4A, Tr. 481, 482).

The trial Court's instruction to the jury that they could consider the above evidence as part of the scheme to defraud struck at the very heart of the petitioner's defense. If the cover-up activities were part of the crime, then the jury might well have reasoned that the petitioners acted in concert with Jensen in this regard and therefore acted in concert with him throughout the entire period the various transactions were taking place. Thus, the jury may have been convinced of a conspiracy because of the cover-up activities and therefore disbelieved the petitioners' assertions of good faith concerning the earlier acts and declarations.

The petitioners therefore found themselves in the position of which Justice Jackson forewarned in his concurring opinion in the *Krulewitch* case, 336 U.S. 445-458, and in particular his language at page 454, which is as follows:

> "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of the jurors who are ready to believe that birds of a feather are flocked together. If he is silent he is taken to admit it and if, as often happens, co-defendants can be produced into accusing or contradicting each other, they convict each other."

In the case at bar there was a great deal of wrongdoing. The petitioners' only defense was that they acted in good faith and that they were beguiled by Jensen's acts and declarations in the same degree as the purchasers who were defrauded. Jensen admitted his guilt. The jury therefore knew that there was in fact some form of a scheme to defraud. On the other hand, Jensen had not been sentenced and had every reason to implicate the other defendants in the case in order to show that this wrongdoing was not completely his own. There was a great deal of evidence of parallel action by the petitioners which, in a sense, is consistent with their claim that they were conducting a sales campaign in reliance of Jensen's statements. Then there was the evidence that the petitioners or some of them acted in concert with Jensen in concealing the wrongdoing. The jury was in effect instructed that attempts at concealment like the one in this case might very well be a part of a scheme to defraud. They were not informed that the alleged acts could only be considered as a part of the crime if those acts were a knowing attempt to further essential purposes of the scheme. Thus the petitioners, who may very well have

been frightened men seeking to avoid punishment of a crime they did not commit, were placed in a position where it was almost impossible for them to establish their innocence.

E. Reversal of the Circuit Court

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

The first ground urged by that court in its opinion to uphold the validity of the requested instruction was to the effect that it was a correct statement of law. It is not necessary to determine whether or not the instruction was a correct statement of the law. It need only be said that it was an inadequate instruction as it failed to inform the jury when and under what conditions avoidance of detection could be considered as part of the scheme to defraud.

Another ground urged by the Circuit Court was to the effect that a conspirator is bound by the acts of all other conspirators until he affirmatively shows that he is withdrawn from the conspiracy. The principal objection to the instruction is that it laid the ground work for the jury finding the existence of a conspiracy. Moreover, that general rule announced by the Circuit Court does not apply, under the *Kraulewitch* and *Grunewald* cases, to situations where the central purposes of a conspiracy have been achieved. A conspiracy is ended when its purpose is achieved.

The Circuit Court also found that there was sufficient evidence to show that all the petitioners participated in the attempts to conceal the sale of the surplus

certificates. This phase of the case will be discussed in the next section.

II.

There Was Insufficient Evidence to Sustain the Granting of the Instruction

A. Insufficiency of the evidence as to all petitioners

Even assuming that the instruction in question does not constitute reversible error as a matter of law, it is the position of petitioners that there was insufficient evidence under the *Grunewald* case to give the instruction. In order to obtain this instruction, the Government must have introduced evidence to prove that the acts to escape detection were in furtherance of the main objective of the conspiracy and the scheme to defraud. The Government's evidence on this point came from the lips of Jensen. He testified in effect that Walters and Terry formulated a plan, to which he acquiesced, whereby they would pick up the surplus certificates and reduce the number of certificates outstanding (Tr. 477-480). Mr. Jensen also testified, upon the urging of the United States Attorney, that this action resulted from the Insurance Commissioner's investigation. The pertinent testimony on this point is as follows:

> "Q. When did the Insurance Commissioner first start to audit your office?
>
> A. I believe it was in—I can't recall the date. It was early in the year.
>
> Q. He came in about January or February, didn't he?
>
> A. Yes, sir.

Q. Were Mr. Cain and Mr. Walters and Mr. Terry aware of this?

A. Yes, sir.

Q. Can you tell me, Mr. Jensen, whether or not this had any effect on your decision to pick up the surplus certificates, the fact that the Insurance Commissioner was there?

A. Yes, I would say it did, yes.

Q. What did it have in effect?

A. Because, as I said before, we wanted to reduce the amount of outstanding certificates.

Q. You didn't want the Insurance Commissioner to find out about it, did you?

A. No, that's right."

As is readily ascertainable the purpose of the testimony was to show that the petitioners and Jensen took steps to avoid detection by the insurance commissioner's office and the criminal liabilities which would result from discovery by the Insurance Commissioner of the oversale of the certificates. Under no theory could the aforementioned acts be considered as part of the scheme to defraud; yet, it was solely this evidence which induced the trial court to grant the instruction in question (Tr. 1364). The evidence not only being insufficient to prove that the petitioners performed acts to avoid detection for the purposes of achieving the main objective of the crime, but in fact being contradictory to such a conclusion, the instruction should not have been given.

Arguments previously posed concerning the possible effect of this instruction on the outcome of the case are also pertinent here and call for the reversal of this case.

B. Insufficiency of the evidence as to the petitioner Cain

Whatever might be the Government's theory for sustaining the instruction in question, there is no basis for allowing the instruction in reference to the defendant Charles P. Cain. Previously it was pointed out that the Circuit Court's statement that there was evidence that all the petitioners participated in the alleged avoidance of detection is in error. There is no evidence that the petitioner Cain participated in any of the cover-up activities; that is, the picking up of the surplus certificates. The only theory that could sustain the giving of the instruction in regard to Mr. Cain is that proposed by the Circuit Court to the effect that all conspirators are liable for all subsequent acts of their co-conspirators until they have affirmatively shown that they have divorced themselves from the conspiracy. The theory of the Circuit Court has been discussed in detail. It has been shown to be contrary to the concepts and principles enunciated in the *Grunewald* and *Krulewitch* cases.

III.

CONCLUSION

The opinion of the Court of Appeals for the Ninth Circuit holds that acts and declarations performed subsequent to an alleged scheme to defraud are a part of that scheme regardless of whether or not the purpose of those acts was solely for avoiding detection and punishment. The effect of the decision will be an extension of the statute of limitations in all fraud cases and to bind alleged co-conspirators to the acts of other alleged co-conspirators long after the scheme

to defraud and conspiracy has been brought to an end. Law to this effect is definitely contrary to the court's ruling in *Krulewitch v. United States*, 353 U.S. 391, and, in particular, *Grunewald v. United States*, 35 U.S. 391. This case should then be reversed and remanded for a new trial, particularly as to the petitioner Charles P. Cain.

Dated this 28th day of July, 1958.

CHARLES S. BURDELL,
JOHN J. KEOUGH,
Attorneys for Petitioners.

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILSON H. WALTERS, CHARLES P. CAIN and KEITH TERRY, *Appellants*, vs. UNITED STATES OF AMERICA, *Appellee*.	No. 15,483 Apr. 11, 1958

UPON APPEAL FROM THE UNITED STATES DISTRICT FOR THE EASTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

Before: FEE and HAMLEY, Circuit Judges, and SOLOMON, District Judge

JAMES ALGER FEE, Circuit Judge:

From a conviction of the crime of violating the fraud provisions of the Securities Act of 1933,[1] the Mail Fraud Statute[2] and for conspiring to violate these statutes,[3] each of defendants appeals. All defendants contend that the evidence against each severally was not sufficient to convict. They claim that the government failed to prove criminal intent on the part of any defendant, that it was error to allow consideration of certain misrepresentations alleged, that the testimony of the wife of one of defendants was competent substantively, that the trial court did not give an adequate instruction relating to good faith and that an instruction that later efforts to avoid detection of a scheme to defraud might be a material part of the original scheme was erroneous.

Appellants were jointly indicted with one Jensen. All pleaded not guilty. After the commencement of the

[1] 15 U.S.C.A. §77q(a)(1).
[2] 18 U.S.C.A. §1341.
[3] 18 U.S.C.A. §371.

trial and after several witnesses had testified, Jensen entered a plea of guilty to counts charging mail fraud and conspiracy. Thereafter, Jensen testified for the government.

The remaining counts were dismissed against Jensen after the trial. Walters was found guilty on all counts and was sentenced to one year and six months' imprisonment; Cain was convicted on mail fraud, sale of securities fraudulently, and conspiracy, and not guilty on the others. He was given an eight months' sentence on one mail fraud count, and imposition of sentence was postponed as to the others. Terry was found guilty of all counts except one relating to mail fraud. He received a three months' sentence on another count of mail fraud. Imposition of sentence was postponed as to all other counts.

The indictment is not challenged. It sets forth an elaborate scheme to defraud by sale of securities and use of the mails, and alleges all defendants conspired to commit these crimes.

The chief defense is that appellants acted severally and in good faith. There are, as is usual in these cases, certain expressions of the witnesses which might be a basis for such a conclusion. But, obviously, good faith is an operation of the mind of the individual and can be proven only by inference.[1] The voluminous record contains adequate evidence of criminal intent as to each appellant. Walters did not testify. Cain and Terry did. The jury found the existence of a criminal intent upon the part of each. This finding is conclusive unless there were no evidence upon which it could be based or there were error of law. The evidence is sufficient as to each of the defendants, and will not be reviewed in detail.

[1] Marshall vs. United States, 9 Cir., 146 F.2d 613, 620; Deaver vs. United States, D.C. Cir., 155 F.2d 740, 744-745, cert. den., 329 U.S. 766.

All the defendants were experienced in the insurance business and advised as to the requirements of the insurance laws of Washington. The persons to whom the stock was sold were generally laymen uninformed of these matters. The existence of a uniform pattern of misrepresentation used by all defendants is patent. There is substantial evidence that each of defendants knew that the statements made to prospective investors were false. Of course, the appellants Cain and Terry denied this, and all appellants produced evidence to the contrary, but the question was for the jury. The record shows each of appellants profited substantially over the period while the operation lasted.

A brief resume of the evidence as to the plan may be of value in understanding the contentions. Walters conceived the idea of taking over an existing "broken down insurance company" and using this shell to raise money for the purpose of financing a new insurance agency, to sell insurance to motels at a reduced rate and to provide a surplus for the broke down company. The desired instrument was found by Walters in Washington Insurance Company (Mutual), of which Jensen was president. Walters, Cain and Jensen discussed the formation of a new insurance company and abandoned the idea because of the drastic provisions of Washington state law. Thereupon, at the insistence of Walters, a complicated agreement, never shown to any investor so far as the record shows, was drawn up and executed by Walters, Cain and Jensen, to raise sufficient finances to put Washington Insurance Company (Mutual) in "good shape." By its terms, there would be sold to the public $25,000.00 of surplus certificates previously authorized to permit that company to obtain additional reserve capital and $30,000.00 of outstanding surplus certificates issued by that company to a corporate

the possibility of allowing him to get promotional stock in the proposed agency company. Later he saw the agreement above referred to. Jensen explained to Terry, as he had previously to Walters and Cain, the limitations on writing insurance on motels. Walters drew up a sales kit, and Cain and Terry made most of the sales. The campaign was successful, partially at least owing to untrue representations made by Cain and Terry to prospects. When the supply of surplus certificates had been sold, Walters, Jensen and Terry determined not to give the money back to investors, and to continue the sale of unauthorized certificates. Terry suggested they could pick up the surplus certificates and give the investors receipts to be held until the stock should be issued. The Washington Insurance Department commenced an investigation. After that date, there were no more sales of surplus certificates, but the evidence shows strenuous efforts to conceal the unauthorized sales by Terry and Jensen, and the latter also performed a bookkeeping operation to conceal the oversale from the examiners.

The fraudulent misrepresentations and omissions related to the pretended approval of the adventure by the Washington Insurance Commissioner, the financial advantages of investing in the surplus certificates, the personal sacrifices of former positions and financial obligations of the salesmen in personally investing in the company. The evidence clearly showed the making of such representations and omissions, and also demonstrated these were made falsely and recklessly and in pursuance of a preconceived plan and design.

Appellants contend that the instructions did not adequately cover the defense that all their actions were in good faith. The court charged the jury on this subject in part as follows:

"Good faith on the part of a defendant is a defense, and the prosecution must prove beyond a reasonable doubt that each defendant was not acting in good faith. Otherwise he is not guilty."

and

"False representations, pretenses, and promises, within the meaning of the law, mean any representations regarding present or past facts, any opinions expressed by defendants, and any predictions or promises as to the future not made in good faith * * *."

and in another portion of the charge:

"There can be honest, though mistaken, judgment of the future from existing conditions; even sincere but visionary optimism is allowable * * *"

and further:

"Ordinarily, fraud cannot be predicated upon promissory statements or promises of what will occur or is likely to occur in the future. A mere promise or prophecy will not support an action for fraud, but promises and representations regarding a future event with fraudulent intent to deceive and without the intention of performing them at the time they are uttered are fraudulent. Opinions and beliefs are not fraudulent.

"If any of the defendants made promises and predictions of future events which were glowing, spectacular, and grandiose, the test is whether or not he actually believed them at the time they were uttered. If he believed them at the time they were uttered, they were not fraudulent, but if he believed in his own mind that they would not materialize, or if they were made recklessly without knowledge of the facts and with intent to deceive, then the representations were fraudulent."

and in addition, in the instruction relating to the charge of conspiracy:

"If the prosecution fails to establish one or more of these elements from the evidence beyond a reasonable doubt, then you should acquit the defend

ant of the charge of conspiracy as to the particular defendant under consideration.

"To conspire means to participate willfully and purposely in the agreement with specific intent to violate the law or reckless disregard as to whether participants act in violation of law, so that a person intentionally encouraging, advising, or assisting other conspirators for the purpose of furthering their enterprise or scheme, with understanding of its lawful character, becomes a willful participant in the conspiracy.

"The charge of conspiracy involves an evil mind and a wrongful intent. The purpose of the conspiracy statute is to protect against forming an agreement to intentionally defraud others, and if a defendant acted in good faith and had an honest belief in the work in which he was engaged and in any statements which he made, he was not guilty of the crime of conspiracy."

Moreover, the court specifically charged the jurors that they "should consider the court's instructions as a whole and not place special emphasis on any part of them." No exception was taken to the charges above set out. The instructions, read as a whole, are adequate on the defense of good faith.

It is also objected that the trial court erred in giving the following instruction:

"A scheme to defraud may well include later efforts to avoid detection of the fraud. Avoidance of detection and prevention of recovery of property fraudulently obtained may be a material part of an illegal scheme."

But the instruction was correct as a matter of law if applicable to the facts. The record in this case clearly shows there were efforts to conceal the sale of surplus

"Avoidance of detection and prevention of recovery of money lost by the victims are within, and often a material part of, the illegal scheme." United States vs. Riedel, 7 Cir., 126 F 2d 81, 83.

certificates, and there is evidence from which the jury might well conclude that each was a participant therein. Besides, there is proof of the existence of a conspiracy, and each person shown to be a party thereto is bound by all the subsequent acts of any co-conspirator until he has proved by affirmative action that he has severed himself therefrom.

There was sufficient basis to allow the jury to consider the testimony of a witness as to the attitude of the owners of Little America Motel interests, a nationally-known motel enterprise in Utah and Wyoming, toward the proposed motel insurance company. Many witnesses had testified that they were told that the Little America Motel interests were so enthused about the motel insurance company that they offered to advance the entire amount of capital required. This proof may not have established the falsity of the representation conclusively, but it was competent.

When Jensen was on the stand, he related many conversations. Mrs. Frances Walters, wife of appellant who did not testify, was offered to testify to a conversation with Jensen after her husband had left the Washington Insurance Company. The testimony was offered to show that Jensen was trying to get Walters back and was stating that everything was all right in the company. The trial court rejected the offer on the ground that it was offered for impeachment and no foundation had been laid therefor. Appellants Walters and Cain seem to contend this was substantive testimony going to the issue of good faith and the reasons they believed they were employed by a sound firm. The statements of Jensen that the business was doing well would seem inadmissible on any theory except to prove the existence of the scheme, even if made to the wife of one who had had some connection therewith. It is stated the testimony was offered to show the intent and knowl-

edge of Walters. Direct evidence of the state of mind of Walters and of his knowledge and intent could only have been obtained if Walters had himself given testimony. But he did not take the stand. The proffered testimony then was not connected to Walters and did not tend to prove intent or knowledge of Walters, and certainly not that of Cain. Neither did the proffered statements tend to prove affirmative withdrawal from the conspiracy. If it had any value as to Jensen, it would be only as impeachment. It was the theory of the government, however, that like statements were made by Jensen at all times in furtherance of the conspiracy.

Affirmed.

(Endorsed:) Opinion. Filed Apr. 11, 1958.

Paul P. O'Brien, Clerk.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILSON H. WALTERS, CHARLES P. CAIN and KEITH TERRY,	*Appellants*,	No. 15483
vs.		
UNITED STATES OF AMERICA,	*Appellee*.	

JUDGMENT

Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington, Northern Division, and was duly submitted.

On consideration thereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment

Filed and entered: April 11, 1958

PAUL P. O'BRIEN, Clerk

APPENDIX III

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Thursday, June 26, 1958

Before: FEE and HAMLEY, Circuit Judges, and SOLOMON, District Judge

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellants, filed May 8, 1958, and within time allowed therefor by rule of Court for a rehearing of the above cause be, and hereby is denied.

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FILED
AUG 28 1958
JAMES R. BROWNING, Clerk

No. 238

In the Supreme Court of the United States

OCTOBER TERM, 1958

WILSON H. WALTERS, CHARLES P. CAIN, AND KEITH TERRY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 238

WILSON H. WALTERS, CHARLES P. CAIN, AND KEITH TERRY, PETITIONERS

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the Court of Appeals was entered on April 11, 1958 (Pet. 9A; Vol. VII 1422). On June 26, 1958, an order was entered denying a timely filed petition for rehearing (Pet. 10A; Vol. VII 1423). Petitioners filed their record and petition in this Court on July 30, 1958 (the 34th day). On July 31, 1958 (the 35th day), petitioners applied for an extension of time within which to file the petition for writ of certiorari. On August 4, 1958, Mr. Justice William O. Douglas signed an order extending the time to file the petition for a writ of certiorari to July 30, 1958. The jurisdiction of this Court is sought to be invoked under 28 U. S. C. 1254 (1).

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Since petitioners had only 30 days from June 26, 1958, to file their petition under Rule 37 (*e*) of the Federal Rules of Criminal Procedure and Rule 22 (2) of the Rules of the Supreme Court, they are clearly late in attempting to file on the 34th day, or July 30, 1958.

The application for an extension having been presented on the 35th day was also out of time and therefore the order of August 4, 1958, was ineffective to confer jurisdiction. Rule 34 (2) of the Rules of the Supreme Court. See *Carleton Screw Products Co.* v. *Fleming*, 317 U. S. 634, discussed in Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (Revised by Wolfson and Kurland, 1951 ed.), section 415, p. 829, fn. 4. See, also, *Overfield* v. *Pennroad Corp.* (order of Mr. Justice Burton vacating prior order of extension) discussed *ibid.*, Appendix B, p. 946, fn. 19.

J. LEE RANKIN,
Solicitor General.

AUGUST 1958.